Mohd Kamaruzzaman bin Mustaffa v Aerotree Defence & Services Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-442–07 OF 2013
YEOH WEE SIAM J
12 NOVEMBER 2013

Civil Procedure — Pleadings — Striking out writ and statement of claim — Profit sharing contract — Continuous failure to pay profits due — Whether bona fide issues to be tried raised — Whether claim scandalous, frivolous or vexatious — Whether an abuse of court process — Whether claim should be struck out — Rules of Court 2012 O 18 r 19(1) & O 92 r 4

This is an application by the defendants to strike out the plaintiff's writ of summons and statement of claim under O 18 r 19(1) of the Rules of Court 2012 and O 92 r 4 of the same Rules. In this case, the plaintiff, together with second defendant ('D2') and third defendant ('D3') agreed to a joint venture business/project related to target-towing. Via the finalised target-towing contract ('the profit sharing contract'), they agreed to share profits as follows: (a) the plaintiff would contribute his target-towing skills and expertise and take 20% of the profits of the target-towing business; and (b) the remaining 80% of the profits would be taken by first defendant ('D1').The plaintiff alleged that D1's involvement as a company was a mere formality, as the Ministry of Defence/the Malaysian Government would only award target-towing contracts to companies, and not to individuals. The plaintiff further alleged that D2 and D3 agreed to the profit sharing contract in their personal capacity, and not as agents of D1. It was agreed that since the target-towing profits would not be immediate, the plaintiff would be employed by D1 under a separate employment contract and be paid a salary in the meantime. If not for the profit sharing contract, the plaintiff would not have joined, or agreed to join D1 as its employee. The plaintiff alleged that from 2008 to 2010, the target-towing business of D1 made profits and that the plaintiff's 20% profit-sharing entitlement was a sum of RM1,637,410. Despite this, the defendants did not pay and continued not to pay the plaintiff his due profits until 2012. They continuously told the plaintiff that the target-towing business had not made any profits. Subsequently, D3 agreed to authorise D1 to pay the said profit sum due to the plaintiff. In fact, the plaintiff was paid the sum of RM200,000 out of the above full sum. Thereafter, the defendants and/or D1 under the instructions or direction of D2 or D3 did not pay or refused to pay the balance sum of profits due to the plaintiff. The plaintiff contended that despite this, D2 and D3 induced the plaintiff to stay employed with D1, and continuously represented to him that he would be paid soon. However, the defendants

continuously failed, refused and/or neglected to make payment to the plaintiff even after various demands, meetings and correspondences had taken place. Hence, the plaintiff averred that the defendants had thus repudiated and breached the profit sharing contract.

Held, dismissing the defendants' application:

(1) It is trite law that the plaintiff's claim can only be struck out if it was a plain and obviously unsustainable. The court did not find the plaintiff's claim to be scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the action, or is otherwise an abuse of the process of the court (see paras 23–24).

(2) The plaintiff had raised several bona fide issues to be tried. It appeared that the plaintiff was not only claiming the profits due to him from D1 but also from D2 and D3, whom the plaintiff alleged had been personally involved in their negotiations with the plaintiff. It was due to the misrepresentations of D2 and D3 that the plaintiff entered into the profit sharing contract and later the employment contract with D1 (see para 20).

(3) Although the defendants alleged that the profit sharing contract did not exist and the plaintiff was a mere employee of D1, yet, the payment of RM200,000 was made to the plaintiff, which sum would not be paid if the plaintiff was just an employee and does not have any entitlement to profit-sharing. Further, while the defendants denied the existence of the profit sharing agreement, yet they contended that they had satisfied the terms of such agreement. Besides the above, the plaintiff was not only claiming against D1 as a company, but D2 and D3 personally for their negotiations and agreement with the plaintiff regarding profit sharing in such business (see paras 20–21).

(4) In view of the serious issues to be tried raised by the plaintiff, in the interest of justice, the plaintiff's claim should not be struck out, but it ought to be heard on its merits in a full trial, with witnesses, in particular D2 and D3, to be called and be subject to cross-examination. This would enable the court to come to a true finding regarding the facts which were seriously in dispute (see para 23).

[Bahasa Malaysia summary

Ini adalah permohonan oleh defendan-defendan untuk membatalkan writ saman dan penyataan tuntutan plaintif di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 dan A 92 k 4 Kaedah yang sama. Dalam kes ini, plaintif, bersama defendan kedua ('D2') dan defendan ketiga ('D3') bersetuju untuk berusaha sama dalam perniagaan/projek berkaitan penundaan bersasaran. Melalui kontrak penundaan bersasaran yang dimuktamadkan ('kontrak perkongsian keuntungan'), mereka bersetuju untuk berkongsi keuntungan

seperti berikut: (a) plaintif akan menyumbang kepakaran dan pengalaman penundaan bersasaran dan mengambil 20% daripada keuntungan perniagaan penundaan bersasaran itu; dan (b) baki 80% daripada keuntungan itu diambil oleh defendan pertama ('D1'). Plaintif mengatakan bahawa penglibatan D1 sebagai syarikat hanyalah formaliti, kerana Kementerian Pertahanan/Kerajaan Malaysia hanya mengawardkan kontrak penundaan bersasaran kepada syarikat, dan bukan kepada individu. Plaintif selanjutnya mengatakan bahawa D2 dan D3 bersetuju dengan kontrak perkongsian keuntungan itu dalam kapasiti peribadi mereka, dan bukan sebagai ejen-ejen D1. Adalah dipersetujui oleh kerana keuntungan penundaan bersasaran bukan serta merta, plaintif akan diambil bekerja oleh D1 di bawah kontrak pekerjaan berasingan dan dibayar gaji buat sementara waktu. Jika bukan kerana kontrak perkongsian keuntungan itu, plaintif tidak menyertai, atau bersetuju untuk menyertai D1 sebagai pekerjanya. Plaintif mengatakan bahawa dari tahun 2008 hingga 2010, perniagaan penundaan bersasaran D1 telah memperoleh keuntungan dan bahawa hak perkongsian keuntungan plaintif sebanyak 20% berjumlah RM1,637,410. Walaupun begitu, defendan-defendan tidak membayar dan terus tidak membayar plaintif keuntungan berikutnya sehingga 2012. Mereka secara berterusan memberitahu plaintif bahawa perniagaan penundaan bersasaran itu tidak memperoleh apa-apa keuntungan. Berikutan itu, D3 bersetuju untuk membenarkan D1 membayar jumlah keuntungan yang patut dibayar kepada plaintif. Bahkan, plaintif telah dibayar sejumlah RM200,000 daripada jumlah penuh tersebut. Selepas itu, defendan-defendan dan/atau D1 di bawah arahan-arahan D2 atau D3 tidak membayar atau enggan membayar baki jumlah keuntungan itu kepada plaintif. Plaintif berhujah bahawa meskipun begitu, D2 dan D3 mendorong plaintif kekal bekerja dengan D1, dan berterusan menggambarkan kepadanya bahawa dia akan dibayar kelak. Bagaimanapun, defendan-defendan berterusan gagal, enggan dan/atau cuai untuk membuat bayaran kepada plaintif selepas pelbagai tuntutan, mesyuarat dan surat-menyurat berlaku. Justeru, plaintif menegaskan bahawa defendan-defendan dengan itu telah membatalkan dan melanggar kontrak perkongsian keuntungan itu.

Diputuskan, menolak permohonan defendan-defendan:

(1) Adalah undang-undang nyata bahawa tuntutan plaintif hanya boleh dibatalkan jika ia jelas dan nyata tidak boleh dikekalkan. Mahkamah tidak mendapati tuntutan plaintif sebagai melampau, remeh atau menyusahkan, atau boleh menjejaskan, memalukan atau melambatkan perbicaraan adil untuk tindakan itu, atau selainnya satu penyalahgunaan proses mahkamah (lihat perenggan 23–24).

(2) Plaintif telah menimbulkan beberapa isu bona fide yang perlu dibicarakan. Ia kelihatan bahawa plaintif bukan sahaja menuntut keuntungan kerana dia daripada D1 tetapi juga daripada D2 dan D3, yang dikatakan plaintif telah terlibat secara peribadi dalam rundingan

mereka dengan plaintif. Ia adalah disebabkan oleh gambaran yang salah daripada D2 dan D3 yang plaintif telah menandatangani kontrak perkongsian keuntungan dan kemudiannya kontrak pekerjaan dengan D1 (lihat perenggan 20).

(3) Walaupun defendan mengatakan bahawa kontrak perkongsian keuntungan tidak wujud dan plaintif adalah seorang pekerja D1 semata-mata, namun, pembayaran RM200,000 telah dibuat kepada plaintif, yang mana tidak akan dibayar jika plaintif hanya pekerja dan tidak mempunyai kelayakan untuk perkongsian keuntungan itu. Selanjutnya, walaupun defendan menafikan kewujudan perjanjian perkongsian keuntungan, tetapi mereka menegaskan bahawa mereka telah memenuhi syarat-syarat perjanjian tersebut. Selain itu, plaintif bukan sahaja menuntut terhadap D1 sebagai sebuah syarikat, tetapi D2 dan D3 secara peribadi untuk rundingan dan perjanjian dengan plaintif mengenai perkongsian keuntungan dalam perniagaan itu (lihat perenggan 20–21).

(4) Berdasarkan kepada isu-isu serius yang perlu dibicarakan sebagaimana ditimbulkan oleh pihak plaintif, demi kepentingan keadilan, tuntutan plaintif tidak boleh dibatalkan, tetapi patut didengar berdasarkan merit dalam perbicaraan penuh, dengan saksi-saksi, khususnya D2 dan D3, yang akan dipanggil dan tertakluk kepada pemeriksaan balas. Ini akan membolehkan mahkamah untuk membuat penemuan sebenar mengenai fakta-fakta yang dipertikaikan dengan serius (lihat perenggan 23).]

Notes

For cases on striking out writ and statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6900–6930.

Cases referred to

Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

See Hua Realty Bhd v See Hua News Holdings Sdn Bhd & Ors [2007] 7 MLJ 525, HC (refd)

Legislation referred to

Companies Act 1965 s 181
Rules of Court 2012 O 18 r 19(1)(b), (c), (d), O 92 r 4

Wan Zafran Pawancheek (Wan Marican Hamzah & Shaik) for the plaintiff.

Jacob Goldie (Jacob Goldie SS Chew) for the defendants.

Yeoh Wee Siam J:

ENCLOSURE 12

[1] This is the notice of application filed by the defendants to strike out the plaintiff's writ of summons and statement of claim ('SOC') (encl 1) under O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012 ('the ROC') and O 92 r 4 of the same Rules.

THE PARTIES

[2] The plaintiff is an aviation pilot, who has expertise in target-towing and is qualified to provide target-towing services.

[3] The first defendant ('D1') is a company incorporated in Malaysia. D1 provides aviation and defence special services, such as target-towing, air combat manoeuvring instrumentation (ACMI), air force multi-engine conversion unit (MECU), etc.

[4] The plaintiff alleged that the second defendant ('D2') is the director and shareholder of D1, while the third defendant ('D3') is the de facto director and/or controlling mind of D1.

BACKGROUND FACTS

[5] Through a series of meetings sometime in 2006, the plaintiff, together with D2 and D3 agreed to a joint venture business/project related to target-towing. Via the finalised target-towing contract, they agreed to share profits as follows ('the profit sharing contract'):

(a) the plaintiff would contribute his target-towing skills and expertise and take 20% of the profits of the target-towing business; and

(b) the remaining 80% of the profits would be taken by D1.

[6] The plaintiff alleged that D1's involvement as a company was a mere formality, as the Ministry of Defence/the Malaysian Government would only award target-towing contracts to companies, and not to individuals.

[7] The plaintiff further alleged that D2 and D3 agreed to the profit sharing contract in their personal capacity, and not as agents of D1. It was agreed that

since the target-towing profits would not be immediate, the plaintiff would be employed by D1 under a separate employment contract and be paid a salary in the meantime. If not for the profit sharing contract, the plaintiff would not have joined, or agreed to join D1 as its employee.

[8] From 2006 onwards, the plaintiff provided his expertise and services to D1 and performed all duties required of him.

[9] The plaintiff alleged that from 2008 to 2010, the target-towing business of D1 made profits amounting to RM8,168,570.48. Thus, under the profit sharing contract, the plaintiff's 20% profit-sharing entitlement is a sum of RM1,637,410.

[10] Despite this, the defendants did not pay and continued not to pay the plaintiff his due profits until 2012. They continuously told the plaintiff that the target-towing business had not made any profits.

[11] When the plaintiff came to know of the profits, he inquired about them in a meeting with D2 and D3 on 3 May 2012. D3 continued to insist that the target-towing business had suffered losses, until the plaintiff confronted her with his knowledge that the target-towing business had made profits. D3 then agreed to authorise D1 to pay the profit sum due to the plaintiff. In fact, subsequently, the plaintiff was paid the sum of RM200,000 out of the full sum of RM1,637,410.10.

[12] Thereafter, the defendants and/or D1 under the instructions or direction of D2 or D3 did not pay or refused to pay the balance sum of profits of RM1,437,410.10 due to the plaintiff.

[13] The plaintiff contended that despite this, D2 and D3 induced the plaintiff to stay employed with D1, and continuously represented to him that he would be paid soon.

[14] The defendants continuously failed, refused and/or neglected to make payment to the plaintiff even after various demands, meetings and correspondences had taken place.

[15] The plaintiff averred that the defendants had thus repudiated and breached the profit sharing contract.

THE PLAINTIFF'S CLAIM

[16] In encl 1, the plaintiff is claiming for loss and damage suffered by him against the defendants. Amongst others, the plaintiff claims:

(a) a declaration that the defendants have breached the contract by way of repudiation;

(b) the sum amounting to RM7,104,060.47 being:

(i)	the balance of 2008–2010 profits	RM 1,437,314.10
(ii)	the plaintiff's unpaid April 2013 salary	RM –
(iii)	the plaintiff's unpaid April 2013 salary	RM 20,400.00
(iv)	loss of expected profits due to the plaintiff under future target-towing contracts of D1	RM 5,457,710.37
(v)	EPF monies wrongfully deducted from the plaintiff's salary	RM 101,198.00
(vi)	claim for ownership of the vehicle	RM 87,438.00;

(c) damages from D2 and/or D3 for untrue and/or misrepresentations that D1 had suffered losses, which were relied on by the plaintiff;

(d) a Declaration that the defendants now hold any commissions, payments and/or profits received on trust and/or were constructive trustees for the plaintiff;

(e) interest on the sum of RM7,104,060.47; and

(f) costs.

THE COURT'S DECISION GIVEN ON 16 OCTOBER 2013

[17] The defendant's application is dismissed. Costs of RM3,000 are to be paid by the defendants jointly to the plaintiff forthwith.

GROUNDS FOR THE COURT'S DECISION

[18] The defendant's application to strike out the writ and SOC is based on the following grounds:

(a) the D2 and D3 are officers and agents of D1/the company and therefore should not be made a party to these proceedings;

(b) that the plaintiffs claim should be confined to D1, ie the plaintiff's employer;

(c) that the allegation of non-payment is directed at the profits of D1;

(d) that D1 is a company with a separate legal personality; and

(e) that the SOC runs foul against the rule of prolix.

[19] It is trite law that the plaintiff's claim can only be struck out if it is a plain and obvious case for striking out where it is clear that the claim is

obviously unsustainable (see the Federal Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36).

[20] The court finds that the plaintiff has raised several bona fide issues to be tried:

Going by the evidence adduced, there are in fact two contracts which form the subject matter of this suit:

(a) the alleged profit sharing contract; and

(b) the plaintiff's employment contract.

It is clear that the plaintiff's claim under the employment contract is against the plaintiff's employer ie D1, and not against D2 and/or D3, for unpaid salaries and wrongful deduction of his EPF monies.

As for the profit sharing contract, at this stage, it appears to me that the plaintiff is not only claiming the profits due to him from D1 but also from D2 and D3, whom the plaintiff alleged had been personally involved in their negotiations with the plaintiff. It is due to the misrepresentations of D2 and D3 that the plaintiff entered into the profit sharing contract and later the employment contract with D1.

The plaintiff contended that D3 is the de facto director of D1, and D1's controlling mind.

The plaintiff further alleged that D2 and D3 were using D1 as a conduit to defraud the plaintiff; D2 and D3 are the primary parties to the profit sharing contract.

The defendants alleged that the profit sharing contract does not exist and the plaintiff was a mere employee of D1. Yet, payment of RM200,000 was made to the plaintiff, which sum would not be paid if the plaintiff was just an employee and does not have any entitlement to profit-sharing.

The plaintiff contended that the word 'equity' in the agreement entitled, 'Perjanjian dan Persefahaman' (exh KM1 of encl 13) is in the nature of a commission to the plaintiff for his services under the profit sharing contract. However, the defendants contended that the word 'equity' refers to an offer of equity of 15% in the company/D1. This agreement refers to the terms and existence of an earlier profit sharing contract (see cheques and bank statements in exh KM2 of encl 13).

While the defendants denied the existence of the agreement, yet they contended that they have satisfied the terms of such agreement (see para 7.6(i) of encl 14).

The plaintiff further asserted that he had agreed to 20%, and not 15%, of the profits of the target-towing business and the figure has been agreed upon by D2 and D3 on numerous occasions. The plaintiff relied on the defendants' representations that the final profits due to him would always be 20%.

[21] Based on affidavit evidence alone, it is difficult at this stage for the court to determine whether the plaintiff was entitled to commission, or profit sharing of 15% or 20% of the profits of the target-towing business. It is clear that the plaintiff is not only claiming against D1 as a company, but D2 and D3 personally for their negotiations and agreement with the plaintiff regarding profit sharing in such business.

[22] Regarding the issue whether the plaintiff's SOC, consisting of 21 paragraphs in 24 pages in small print, offends the rule against prolix, the court finds that the plaintiff's averments in the SOC are unnecessarily detailed, long, and not clearly presented in a succinct manner, and to some extent contain evidence which should not have been pleaded but which should appropriately be reserved for the trial.

In *See Hua Realty Bhd v See Hua News Holdings Sdn Bhd & Others* [2007] 7 MLJ 525 Hamid Sultan Abu Backer JC (now JCA) in striking out a petition filed pursuant to s 181 of the Companies Act 1965 said at p 536:

> This Petition is, as if an entire set of complaints, whether or not they fall within the purview of s 181, have all been *hurled into the court* with the duty *foisted on the court to pick and choose* to allow the petition. *The court is not a filter of debris* (see *Watson v Rodell* 3 Ch D 380). Where a petition is nothing more than a *jangled mass of complaints* all lumped together over which the court is unable to make any finding at all, of oppression or undue prejudice, because the petition is *nothing more than an exercise in prolixity, then it must fall. It has long been held that where the cause papers are so framed as be too prolix, where they disclose immaterial facts,* and *set out at great length* documents which could not be material to the issues at hand, such as *to embarrass the opposite party* (see *Cashin v Cradock* 3 Ch D 376), such pleadings are liable to be, and have, on occasions, been *struck out* (see *Davy v Garret* (1877) 1 Ch D 473). (Emphasis added.)

In the present case, despite the prolixity which the court frowns upon, the plaintiff's pleadings do disclose material facts and a reasonable cause of action and are not in intended to embarrass the defendants.

[23] In view of the serious issues to be tried raised by the plaintiff, the court is satisfied that in the interest of justice, the plaintiff's claim should not be struck out, but it ought to be heard on its merits in a full trial, with witnesses, in particular D2 and D3, to be called and be subject to cross-examination. This will enable the court to come to a true finding regarding the facts which are seriously in dispute.

[24] The court does not find the plaintiff's claim to be scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the action, or is otherwise an abuse of the process of the court.

[25] Based on the above considerations, the court ordered accordingly. **A**

Defendant's application dismissed.

Reported by Ashgar Ali Ali Mohamed **B**

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